Mississippi Power Company *and* U-21 Representing International Brotherhood of Electrical Workers Local Unions Nos. 1204, 1209, 1210, 1211, AFL–CIO.
Case 15–CA–13436

September 29, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On January 16, 1997, Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

The judge found, and we agree, that the Respondent violated Section 8(a)(5) of the Act by refusing to bargain with respect to the terms and conditions of employment of its employees represented by the Local Unions 1204, 1209, 1210, and 1211 (the Locals).[3] Specifically, we agree with the judge that the Respondent unlawfully announced its planned Other Post Retirement Benefit (OPRB) changes for future retirees to the Locals on April 21, 1995,[4] and that it thereafter unlawfully refused to bargain with the Locals over these changes.[5] We note that the Respondent explicitly refused to bargain about its announced future changes on July 18, 1995, during the period when it and the Locals were engaged in negotiations to replace the contract that expired on August 15, 1995. In finding the violation, the judge considered and rejected the Respondent's July 18, 1995 reasons for refusing to bargain with the Locals over the changes, namely, that (1) the OPRB changes did not affect statutory employees covered by the Act, and (2) even assuming the changes did affect statutory employees and concerned a mandatory subject of bargaining, the Respondent was not obligated to bargain over the OPRB changes because the Locals had waived their right to bargain over the issue. The Respondent has renewed these contentions in its exceptions. For the following reasons, we find these exceptions without merit.

In contending that the OPRB changes do not affect statutory employees, the Respondent argues that since the OPRB changes will affect "future retirees," and that term "is not a term fitting within the definition of 'employee' as that term pertains to collective bargaining obligations under the Act," the judge erred in finding that future retirees are statutory employees owed a duty to bargain over mandatory subjects. In making this assertion, the Respondent relies on *Chemical Workers v. Pittsburgh Plate Glass Co.,* 404 U.S. 157 (1971), for the proposition that presently retired former employees are not employees under the Act.

While we do not disagree with the Respondent's description of the holding in *Pittsburgh Plate Glass,* i.e., that *presently* retired former employees are not employees under the Act, we find without merit the Respondent's attempt to extend this holding to exclude *active* employees from coverage under the Act on the ground that they are "future retirees."[6] Indeed, the Supreme Court in *Pitts-*

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order to include remedial provisions that are in accord with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996), as modified in *Excel Container, Inc*., 325 NLRB 17 (1997).

[3] As explained by the judge, these four Locals represent approximately 600 of the Respondent's approximately 1400 employees. A joint council (U-21) represents the four Locals in collective-bargaining negotiations with the Respondent. The Respondent admitted that it is a party to a memorandum of agreement with the Locals, and that it recognizes the Locals as the exclusive representative of the Respondent's employees in a unit described in the memorandum. The parties stipulated to admission of memoranda of agreement dated August 16, 1992, to August 16, 1995, and August 16, 1995, to August 16, 1998.

[4] The parties stipulated that the Respondent announced the OPRB changes to unit employees' retirement benefits at a meeting with the Locals on April 21, 1995. The changes will affect employees who retire after January 1, 2002, and who were not grandfathered into the previous plan. Grandfathered into the previous plan were employees who retired on or before January 1, 2002, employees who were 55 with 15 years of service on January 1, 2002, and employees with 30 years of service before January 1, 2002.

As to the OPRB changes themselves, the April 28, 1995 edition of the Respondent's newsletter, "Dialogue" (GC Exh. 11), explains that "[f]or future retiree life insurance, the amount of company-paid coverage will be tied to years of service, up to a maximum of $50,000." The newsletter further explains that "[l]ike the life insurance benefit, company contributions toward medical premiums will be tied to years of service. The company will pay a percentage of the premium up to established premium ceilings." Thus, under the OPRB changes, the Respondent will tie the amount of its premium contributions to the retirees' life insurance and medical benefits to their years of service and will place a cap on the amount of those contributions.

[5] The judge's decision states that the complaint alleges that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally changing working conditions. More precisely, the complaint alleges that the Respondent violated Sec. 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Locals on July 18, 1995, about the announced OPRB changes.

[6] Assuming that all active employees are future retirees, we question whether anyone, under the Respondent's proposed analysis, would be covered by the Act.

burgh Plate Glass expressly rejected this contention. As explained in *Midwest Power Systems*, 323 NLRB 404, 406 (1997), enf. mem. denied on other grounds 159 F.3d 636 (D.C. Cir. 1998):[7]

> In *Pittsburgh Plate Glass Co.,* the Supreme Court considered whether a midterm unilateral modification of insurance benefits for employees who had already retired from bargaining unit work constituted an unfair labor practice under the Act. The Supreme Court concluded that, because retirees were not "employees" within the meaning of Section 2(3) of the Act and their benefits did not "vitally affect" the terms and conditions of employment of bargaining unit employees, the retirees' insurance benefits were not a mandatory subject of bargaining. *In reaching this conclusion, however, the Supreme Court expressly stated that "the future retirement benefits of active workers are part and parcel of their overall compensation and hence a well-established statutory subject of bargaining.*" 404 U.S. 157, 180. [Emphasis added.]

Accordingly, as noted above, we find this exception without merit. We now address the Respondent's waiver argument.

The Respondent relies, inter alia, on retention of rights language contained in its March 1993 Medical Benefits Plan (Medical Benefits Plan—GC Exh. 3) to contend that the Locals waived their right to bargain over the OPRB changes.[8] The Respondent also excepts to the judge's finding, as a factual matter, that the retention of rights language that it relies on was contained in the April 21, 1995 OPRB Update that set out the OPRB changes (over which the Locals did not have an opportunity to bargain) instead of in the Medical Benefits Plan (over which, the Respondent contends, the Locals did have an opportunity to bargain). Consequently, the Respondent argues, in effect, that since the Locals had an opportunity to bargain over retention of rights language at issue here, the Locals have waived their right to bargain over the April 1995 OPRB changes implemented by the Respondent. We find merit in these exceptions only to the extent set out below.

Initially, we agree with the Respondent that the judge erred in finding that the retention of rights language relied on by the Respondent is contained in the OPRB Update, and agree with the Respondent that it is contained instead in the Medical Benefits Plan.[9] However, we cannot agree with the Respondent's assertion, advanced in justification of its July 18, 1995 refusal to bargain, that the plan's language "constitutes an explicit waiver by the IBEW of any right to bargain." The short answer to that claim is that the 1993 Medical Benefits Plan is an employer-created document. It is in no way an "explicit" statement by the Union about any subject, much less a permanent waiver of the Union's right to bargain over the future retirement benefits of active workers.

Similarly deficient is the Respondent's contention that the Locals waived their right to bargain over the OPRB changes because they had acquiesed in the Respondent's prior changes to the OPRBs and because a side-letter agreement (set out at pp. 80–81 at the end of the last and current agreements (Jt. Exhs. 1 & 2)) contains a "zipper clause" that permits the Respondent to make these OPRB changes unilaterally. We shall consider these issues in turn.

As to the Respondent's former contention, i.e., that the Locals waived their right to bargain over the OPRB changes because they had acquiesed in the Respondent's prior changes to the OPRBs, we agree with the judge that this contention lacks merit. Even assuming that the Locals had not requested bargaining over previous changes to the OPRBs, "union acquiesence in past changes to a bargain-

[7] In a subsequent unpublished decision of Febuary 18, 1998 (No. 97-1251), the court remanded the case to the Board for a determination of "whether the collective bargaining agreements actually incorporated the retiree plan documents" which included reservation of rights language that the respondent relied on to assert that the union had waived its right to bargain over the future retirement benefits of active employees. Slip op. at 4.

[8] Art. X of the Medical Benefits Plan (GC Exh. 3), entitled "AMENDMENT AND TERMINATION OF PLAN" states in part:

10.1 *Amendment of Plan.* The Company, through its Duly Authorized Officer, shall have the right at any time by instrument of writing, duly executed, to modify, alter, or amend, in whole or in part, the Plan

In its exceptions, the Respondent also contends, in effect, that the retention of rights language contained in the Medical Benefits Plan also permitted it to make the OPRB changes to the retirees' life insurance coverage. Since the Medical Benefits Plan does not include life insurance coverage and, in fact, a separate life insurance plan is in effect for the Respondent's employees, we reject this contention. For the same reasons, we reject the Respondent's further contention that the parties' side-letter agreement, entitled "Group Medical Insurance Agreement," discussed below, also permitted it to make the OPRB changes to the retirees' life insurance coverage. Further, even assuming arguendo that the reservation of rights language and the side-letter agreement were relevant to the retirees' life insurance coverage, we would find that the retention of rights language and the side-letter agreement did not permit the Respondent to make the OPRB changes to the retirees' life insurance coverage for the same reasons that we find that that language did not permit it to make the OPRB changes to the retirees' medical benefits plan.

[9] The reservation of rights language quoted by the judge ("Company retains all rights to modify or terminate the retiree life plans") in the "Retention of Rights and Zipper Clause" section of his decision is found in a document entitled "OPRB Plans—Plan Details After Recent Changes" (GC Exh. 10) which the Respondent distributed to union officials during pension negotiations in December 1995, some 8 months after the Respondent announced its OPRB changes. The Respondent does not rely on this language in arguing that the Locals waived their right to bargain over the OPRB changes.

able subject does not betoken a surrender of the right to bargain the next time the employer might wish to make yet further changes, not even when such further changes arguably are similar to those in which the union may have acquiesced in the past." *Exxon Research & Engineering Co.,* 317 NLRB, 675, 685–686 (1995), enf. denied on other grounds 89 F.3d 228 (5th Cir. 1996).

As to the Respondent's latter contention, i.e., that the zipper clause contained in the side-letter agreement permitted it to make the OPRB changes unilaterally, we agree with the judge, but only for the following reasons, that the so-called "zipper clause" does not evidence a clear and unmistakable relinquishment by the Locals of their right to bargain over OPRB changes.

The side-letter agreement, which was in effect when the OPRB changes were announced, states that it

> will run concurrently with the term of the Memorandum of Agreement, and remain in effect from year-to-year thereafter, from August 16 to August 16, unless changed or terminated by either party in the following manner. The party desiring to change or terminate the agreement after the expiration of the Memorandum of Agreement, must notify the other party in writing at least sixty (60) days prior to August 16 of the year in which such termination or changes are desired, stating in the notice the nature of the changes desired. Until the parties have agreed upon such changes the provisions of the agreement shall remain in full force and effect.

The side-letter also contains the following language (emphasis added):

> The offer is that *during the term of the resulting agreement* Mississippi Power Company will continue to pay seventy percent of the cost of group medical insurance coverage for the employee and one dependent and for an employee and family, and will continue to contribute $92.80 of the cost of the above insurance for a single employee's coverage. Further, it is agreed that in the event of any increase in premiums for the above insurance, the Company will contribute seventy percent of the amount of that increase, and the *employee* will contribute thirty percent of the amount of the increase.
>
> The condition of this obligation by the Company will be an agreement, as evidenced by the Union's acceptance, that the matter of insurance coverage or change in the Company's contribution toward the premium for insurance coverage of its *employees* shall not be subject to bargaining or a request for bargaining by the Union *until the expiration of the Memorandum of Agreement*, except by mutual consent.

Finding, in effect, that the zipper clause applied to the OPRB changes at issue here, the judge found that "the language in that [zipper] clause appears to preclude Respondent from unilaterally changing OPRB. At most it is ambiguous." Accordingly, the judge found that the zipper clause did not establish that, as the Respondent contended, the Locals had waived their right to bargain over the OPRB changes.

Contrary to the judge, we find that the zipper clause does not apply to the OPRB changes at issue here and, on this basis, find that the zipper clause does not evidence the Locals' waiver of their right to bargain over the OPRB changes. The zipper clause, by its terms, contains an offer by the Respondent and an acceptance by the Locals that covers the employees' medical premiums "during the term of the resulting [side letter] agreement." The announced OPRB changes, however, are for changes that will not occur until January 1, 2002, a date outside the term of the side-letter agreement. Therefore, the announced OPRB changes are not in any way addressed by the zipper clause. Since the announced OPRB changes will fall outside the term of the side-letter agreement, the zipper clause contained in the side-letter agreement cannot constitute a clear waiver of the Locals' right to bargain over those changes. Therefore, the zipper clause does not permit the Respondent to make the OPRB changes at issue here without bargaining with the Locals.

For all these reasons, we agree with the judge that the Respondent violated Section 8(a)(5) of the Act by announcing its OPRB changes to the Locals on April 21, 1995, and by refusing thereafter to bargain with the Locals over these changes.[10]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent,

[10] Although the judge found that the Respondent violated the Act as alleged, he found that since the Locals were not the representative of anyone that retires after January 1, 2002, unless that person is currently employed, his ruling did not apply "to anyone not currently employed in the bargaining unit." Citing *Exxon Research & Engineering Co.,* 317 NLRB at 676 fn. 3, the judge therefore found that "[e]mployees hired after Respondent's illegal OPRB changes are not included in the relevant bargaining unit." We disagree. As a preliminary matter, we note that the issue in *Exxon* was whether the Board's Order should encompass the unilateral changes at issue there on a corporatewide or unit basis, i.e., the geographical extent of the Board's Order. By contrast here, the judge would, in effect, divide the bargaining unit into chronological divisions based on whether unit employees were hired prior to or after the Respondent's April 21, 1995 OPRB changes. We decline to make such a division.

Mississippi Power Company, Gulfport, Mississippi, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with the Locals about mandatory subjects, including future retirement benefits of current employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively with International Brotherhood of Electrical Workers, Local Union Nos. 1204, 1209, 1210, 1211, AFL–CIO, as the exclusive representative of the employees in the appropriate bargaining unit described in article I, section 1, of their collective-bargaining agreement (memorandum of agreement) about mandatory subjects, including future retirement benefits of current employees, and, if an understanding is reached, embody that understanding in a signed agreement.

(b) Within 14 days after service by the Region, post at its facilities in Mississippi copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 21, 1995.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to bargain with International Brotherhood of Electrical Workers, Local Union Nos. 1204, 1209, 1210, 1211, AFL–CIO, about mandatory subjects, including future retirement benefits of current employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain collectively with International Brotherhood of Electrical Workers, Local Union Nos. 1204, 1209, 1210, 1211, AFL–CIO, as the exclusive representative of the employees in the appropriate bargaining unit described in article I, section 1, of our collective-bargaining agreement (memorandum of agreement) about mandatory subjects, including future retirement benefits of current employees, and, if an understanding is reached, embody that understanding in a signed agreement.

MISSISSIPPI POWER COMPANY

Zoe Panarites, Esq. and *Tracie Jackson, Esq.,* for the General Counsel.

David C. Hagaman, Esq. and *Laura H. Kriteman, Esq*., of Atlanta, Georgia, for the Respondent.

DECISION

WILLIAM N. CATES, Administrative Law Judge. This hearing was held on October 10 and 11, 1996, in New Orleans, Louisiana. The charge was filed on September 21, 1995. The complaint issued on November 30, 1995.

I. JURISDICTION

Respondent, a wholly owned subsidiary of the Southern Company, admitted that it is an investor owned electric utility that generates and distributes electrical and utility services and is a corporation with various places of business located throughout the State of Mississippi. It admitted that during the 12 months ending October 31, 1995, it derived gross revenues in excess of $250,000 and during that same 12-month period it purchased and received at its Mississippi facilities goods valued in excess of $5000 directly from points outside Mississippi. Respondent admitted and I find that at all times material it has been an employer engaged in commerce as defined in the National Labor Relations Act (the Act).

[11] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

II. LABOR ORGANIZATIONS

Respondent admitted that International Brotherhood of Electrical Workers, Local Numbers 1204, 1209, 1210 and 1211, AFL–CIO (the Union, IBEW, or Locals) are labor organizations within the meaning of Section 2(5) of the National Labor Relations Act (the Act) and that those locals have been represented by a joint council which negotiates collective-bargaining agreements.

Approximately 600 employees of Respondent's approximately 1400 employees are represented by the four above-mentioned Locals.

III. THE UNFAIR LABOR PRACTICE ALLEGATIONS

It is alleged that Respondent unilaterally changed working conditions for employees represented by the Union.

Respondent admitted complaint allegations that it is a party to a memorandum of agreement with the Locals, and that it recognizes the Locals as the exclusive representative of Respondent's employees in a unit described in the memorandum. Respondent admitted that the bargaining unit described in the memorandum constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act and that, at all material times, the Locals have been the exclusive collective-bargaining representative of the unit employees. The parties stipulated to admission of memoranda of agreement dated August 16, 1992, to August 16, 1995, and August 16, 1995, to August 16, 1998.

A. 1995 Activity

The parties stipulated that Respondent announced "Other Post Retirement Benefits" (OPRB) changes to the unit employees' retirement benefits at a meeting with the Locals on April 21, 1995. Local Union 1210 President and Business Manager and U-21 Chairman James Armstrong testified that Respondent gave the Locals a copy of OPRB Update (GC Exh. 6) during the April 21 meeting. Armstrong testified that the changes mentioned in the OPRB Update effect the premiums to be paid by employees that retire after January 1, 2002, and were not grandfathered into the previous plan. Those employees grandfathered into the current plan include those that retire on or before January 1, 2002, those that are 55 with 15 years' service on January 1, 2002, and those with 30 years' service before January 1, 2002.

The OPRB changes include caps on employer contributions to medical premiums and coverage limits on the amount of life insurance.

Respondent's manager, employee relations, Charles Davis, recalled that Respondent announced the OPRB changes in April 1995. Contract negotiations between Respondent and the Locals started in July 1995. The previous agreement expired on August 15, 1995.

The Locals wrote Respondent on June 26, 1995, and requested to bargain over the OPRB changes announced at their April 21 meeting with Respondent. The Union wrote that the changes would result in a hardship on current employees in the retirement plan.

Respondent replied to the Locals' June 26 letter on July 18, 1995. Respondent stated in that letter that the OPRB changes are not a mandatory subject of bargaining for the following reasons:

(1) The OPRB changes will not impact the current bargaining unit, if at all, until the distant future and OPRB's are not addressed in the collective bargaining agreement.

(2) The Company has unilaterally implemented and modified OPRB's for many years and the IBEW has never challenged those actions or asked to negotiate OPRB's: therefore, the IBEW has accepted the Company's actions on OPRB's and has waived any claim to a right to negotiate over the current changes through inaction and past practice.

(3) The postretirement medical coverage plan document provides the Company has the right and discretion to unilaterally modify the plan. Such language constitutes an explicit waiver by the IBEW of any right to bargain.

B. Pre-1995 Activity

James Armstrong testified that Respondent has negotiated with the Locals for many years. According to Armstrong, before 1995, Respondent did occasionally suggest changes in insurance coverage and premiums and the Locals had always agreed to those changes.

Thomas Ryle testified that he retired from Respondent on November 1, 1994. Before his retirement he was president and business manager of Local 1211. Ryle testified that the Locals traditionally asked for improved insurance during contract negotiations. He recalled that some changes in insurance were negotiated outside regular contract negotiations. One such change Ryle recalled involved a change in the coverage for visits to a chiropractor. That change occurred in 1988. Those changes affected actual employees and retirees. According to Ryle, everything received by bargaining for unit employees was also granted to nonunit employees and retirees.

Other changes recalled by Ryle included Respondent moving from Blue Cross to Provident and from Provident to a self-funded plan. Ryle testified that those changes occurred during the terms of collective-bargaining contracts. The changes were proposed by Respondent and the Locals, having no objections, agreed to the changes. Ryle admitted Respondent representatives have told the Locals that Respondent does not negotiate regarding health and life insurance plans but they will negotiate over the contribution levels.

In 1988, according to Thomas Ryle, Respondent proposed a 38-percent increase in medical premiums. By cutting back in benefits the Locals were able to reduce the increase to 30 percent. The changes proposed by the Locals included implementation of a $300 deductible for emergency care and the requirement of a second opinion for surgery.

Local 1204 President and Business Manager Don Ellzey testified that the collective-bargaining agreement between Respondent and the Locals includes medical and life insurance provisions including percentage of premiums paid by employees and coverage. (See pp. 80, 81 Jt. Exh 1 & 2.) Ellzey testified that the Locals negotiated with Respondent in 1986 over changes in Respondent's accidental death and dismemberment insurance. He also recalled negotiations in 1987 over the Respondent's proposal to increase medical benefit premiums by 38 percent. The Locals successfully negotiated a lower percentage increase. The Union agreed to a 1993 proposal by Respondent to increase premiums for medical and life insurance benefits.

Respondent called James Stone Jr. Stone was formerly Respondent's director of human resources. He reported to Vice President Don Mason. Stone was involved in contract negotiations beginning in the early 1960s. He testified that Respondent and the Locals never did negotiate over changes in the actual terms of medical and life plans. According to Stone the Locals proposed changes in medical and life plans but Respondent replied that they did not bargain over the plans themselves. Respondent expressed a willingness to bargain over employee and employer contributions to the premiums for those plans. Respondent met with the Locals at various times to discuss changes in medical and life plans. During those meetings Respondent occasionally announced proposed changes in medical and life. However, Respondent and the Locals did not negotiate those changes. Respondent took the position that those changes were not subject to the bargaining process. Those changes affected all Respondent's employees and were not limited to bargaining unit employees. Respondent and the Locals never negotiated retiree medical and life benefits.

Ben K. Glenn, Respondent's senior employee relations administrator, formerly served as manager of employee benefits. He was responsible for the administration of benefits for Respondent's covered and noncovered employees. According to Glenn, Respondent has made several changes to medical and life plans since 1977. Glenn testified regarding summaries received in evidence, that Respondent made several changes in medical and life benefits from 1986 and before. According to Glenn, Respondent made those changes without bargaining with the Locals. Respondent and the Locals did meet regarding changes, but those meetings involved only Respondent notifying the Locals of the changes.

On cross-examination, Glenn could not recall whether Respondent had originally proposed higher increases in premiums and that the Locals had successfully negotiated the increases at a lower percentage. Glenn admitted that retiree benefits, even those that had not vested, could affect his decisions about his retirement years.

Charles Davis, Respondent manager of employee relations, testified there have been agreements between Respondent and the Locals since 1940. The agreements between the Locals and Respondent since the early 1980s have contained only one reference to medical insurance. That is a letter that is found on page 80 of the current agreement. There is no mention of retiree benefits in the current or past agreements. Davis testified that to his knowledge there have been no other agreements between Respondent and the Locals covering Respondent's welfare plans or to continue retiree medical or life benefits.

According to Davis Respondent's position has and continues to be that Respondent will notify the Locals and ask them to meet and discuss changes. Respondent then presents and educates the Locals on the changes. However, Respondent feels it has the right to make any of those changes and is not required to bargain regarding any changes. Davis testified that the Locals have historically agreed with Respondent on that position. Respondent and the Locals have never bargained over any aspect of retiree health or life benefits.

Davis testified that the Locals have requested bargaining over medical and life plans for active employees and that Respondent has replied that it was not going to bargain over changes to the benefit plans. He recalled that the Locals have never requested bargaining over retiree life or medical benefits.

Charles Davis admitted that Respondent has bargained with the Locals over retirement pension benefits. Davis did not deny James Armstrong's testimony that pension negotiations between Respondent and the Locals are held separately from regular contract negotiations and that the pension negotiations in 1995 covered the benefits in the pension plan. Davis denied that Respondent has ever bargained with the Locals for medical and life benefits for retirees during those pension negotiations.

Charles Davis agreed that Tom Ryle wrote Don Mason in 1987 or 1988, regarding requested changes in chiropractic care. Davis denied that Respondent agreed to reduce any proposed premium increase in 1986, 1987, or 1988, during conversations with the Locals. Davis was unable to recall why a 25-percent premium increase was instituted even though a 38-percent increase is mentioned in General Counsel's Exhibit 15. Davis admitted on redirect examination that Respondent has negotiated with the Locals regarding the percentage relationships relative to the medical and life premium contributions from employer and employees.

Davis recalled that after Respondent presented proposed changes to the Locals in 1993, Tom Ryles asked if the Locals would be allowed to discuss the matter further. Davis told Ryles that the changes would be implemented effective March 1, 1993.

C. Retention of Rights and Zipper Clause

A reservation-of-rights clause is included in the OPRB Update, which Respondent presented to the Union on April 21, 1995: "Company retains all rights to modify or terminate the retiree life plans."

Charles Davis, Respondent's manager of employee relations, admitted there is nothing in writing showing Respondent and the Locals have agreed to the Respondent's reservation-of-rights language. However, according to Davis, the Locals have never proposed changes or elimination of the reservation-of-rights language.

As to the zipper clause, Charles Davis testified that all agreements between the Locals and Respondent since the early 1980s, have contained only one reference to medical insurance. That is a letter from Respondent to the Unions that is found on page 80 of the current agreement:

> This offer shall become an agreement when the Union indicates its acceptance hereof by signing, and returning, one of the copies of this letter to the Company in Gulfport.
>
> The offer is that during the term of the resulting agreement Mississippi Power Company will pay the cost of group medical insurance coverage 75 percent of the total two-party medical premium, 75 percent of the total family medical premium and 80 percent of the total single medical premium. Further, it is agreed that in the event of any increase in premiums for the above insurance, the Company will contribute 75 percent of the amount of that increase for two-party and family, and the employee will contribute 25 percent of the amount of the increase; the Company will contribute 80 percent for single employee's coverage, and the employee will contribute 20 percent of the increase.

> The condition of this obligation by the Company will be an agreement, as evidenced by the Union's acceptance, that the matter of insurance coverage or change in the Company's contribution toward the premium for insurance coverage of its employees shall not be subject to bargaining or a request for bargaining by the Union until the expiration of the Memorandum of Agreement, except by mutual consent.

In response to the administrative law judge, Davis admitted there was no bargaining over the zipper clause. (Jt. Exh. 2, p. 80.) That clause was unilaterally compiled by Respondent. On redirect examination,Davis testified that letter does constitute a binding obligation between Respondent and the Locals.

D. Respondent's Brief

In its brief Respondent, among other matters, raised questions regarding two matters:

Retention of Rights and Zipper Clause: As to the retention of rights clause, that provision is contained in the OPRB Update that presents the primary issue in this matter. That matter was not the product of negotiations between Respondent and the Union.

As to the zipper clause, the language in that clause appears to preclude Respondent from unilaterally changing OPRB. At most the language is ambiguous. The Board has consistently refused to find waiver by unions in situations similar to the instant one. *Exxon Research & Engineering* Co., 317 NLRB 675 (1995); *T.T.P. Corp*., 190 NLRB 240, 244 (1971).

Respondent argued that the complaint alleged an obligation to bargain for future retirees a group not defined as employees under the Act. *Chemical Workers v. Pittsburgh Plate Glass Co*., 404 U.S. 157, 165, 171–173 (1971); *Star Tribune*, 295 NLRB 543 (1989).

The Unions are the bargaining representative of a unit of active employees and, as such, do not represent future employees. To that extent Respondent is correct. The Union is not the representative of anyone that retires after January 1, 2002, unless that person is currently employed. For that reason this ruling does not apply to anyone not currently employed in the bargaining unit. Employees hired after Respondent's illegal OPRB changes are not included in the relevant bargaining unit. See *Exxon Research & Engineering*, supra at fn. 3.

Findings

Credibility

The record, including documents and testimony, convinces me that the Locals requested bargaining over OPRB changes announced by Respondent on April 21, 1995. That request was made by letter dated June 26, 1995. I find that Respondent rejected the bargaining demand in its July 18, 1995 letter (see above). I do not credit the testimony, including that of Charles Davis, which is contrary to the above findings. I find that Respondent has continued to refuse to bargain over those OPRB changes.

In consideration of the entire record and the demeanor or the witnesses, I am convinced and find that Thomas Ryle and Don Ellzey were truthful. I credit their testimony especially that testimony that shows that the Union negotiated with Respondent regarding coverage for visits to a chiropractor and that the Union successfully negotiated a decrease in Respondent's proposed 38-percent increase in medical premiums in 1987 or 1988.

I find that the record shows that Respondent and the Locals did not routinely negotiate over medical and life benefits during contract negotiations but that those matters were discussed separately during the existence of collective-bargaining agreements. Frequently those discussions resulted in the Locals accepting without dispute, medical and life changes proposed by Respondent. In that regard I credit the testimony of James Stone Jr. that the Locals proposed changes in medical and life plans but that Respondent took the position that it did not bargain over the plans themselves. I credit his testimony that Respondent expressed a willingness to bargain over employer and employees contributions to the premiums of those plans.

Conclusions

There is no dispute but that Respondent had a bargaining obligation with the Locals. At issue is whether that obligation extended to the instant issue, i.e., the OPRB changes.

In determining that issue I must question whether the alleged unilateral changes involve a mandatory subject of bargaining. *NLRB v. Borg-Warner Corp*., 356 U.S. 342, 349 (1958); *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

The Board and courts have held that pension plan benefits for future retirees is a mandatory subject of bargaining. *Keystone Consolidated Industries,* 309 NLRB 294 (1992); *T.T.P. Corp*., supra; *Chemical Workers v. Pittsburgh Plate Glass Co*., supra. As noted, for example, in *United Hospital Medical Center*, 317 NLRB 1279 (1995), "Health [and life] benefit plans are a mandatory subject of collective bargaining. They may not be altered or eliminated without bargaining to mutual agreement or to a good-faith impasse on such action. *NLRB v. Katz*, 369 U.S. 495, 497 (1993)." In as much as health and life benefit plans are mandatory subjects of bargaining and in as much as the Board and courts have concluded that pension benefit plans for future retirees are mandatory subjects of bargaining, I am persuaded that health and life insurance coverage in retirement is a matter relating to wages, hours, and other terms and conditions of employment such as to constitute a mandatory subject of bargaining.

In determining whether the General Counsel has proved that Respondent engaged in unfair labor practices, I shall consider the reasons Respondent gave for not engaging in collective bargaining regarding the April 21 OPRB changes:

> *The OPRB changes will not impact the current bargaining unit, if at all, until the distant future and OPRB's are not addressed in the collective bargaining agreement*.

An employer has a duty to bargain over terms and conditions of employment for bargaining unit employees. However, an employer has no duty to bargain regarding current retirees. Respondent contends that the instant matter involves bargaining over benefits for retirees and that it did not make changes in terms and conditions of employment of present members of the bargaining unit. *Murphy Diesel Co*., 184 NLRB 757, 763 (1970); *Civil Service Employees Assn.*, 311 NLRB 6, 7 (1993). Respondent argued that courts have refused to hold that decisions that are merely tangential to the rights of present members of the bargaining unit constitute mandatory subjects of bargaining,

citing, *Chemical Workers v. Pittsburgh Plate Glass Co.,* 404 U.S. 157 (1971); *Keystone Steel & Wire v. NLRB*, 41 F.3d 746 (D.C. Cir. 1994); and *Torrington Co*., 305 NLRB 938 (1991).

There is a clear difference between bargaining over future retirement benefits for active employees and benefits for current retirees. Here the discussion involves employees that will not retire before 2002. As shown above the changes mentioned in Respondent's OPRB Update effect the premiums to be paid by employees that retire after January 1, 2002, and were not grandfathered into the previous plan. Those employees grandfathered into the current (previous) plan include those that retire on or before January 1, 2002, those that are 55 with 15 years' service on January 1, 2002, and those with 30 years' service before January 1, 2002.

Obviously current retirees, having retired before January 1, 2002, fall within the above exceptions and are not affected by the OPRB changes.

The OPRB changes involve bargaining unit employees. They do not involve retirees and as such do not involve nonmandatory subjects of bargaining. Moreover, since the unit employees are not retirees or other nonstatutory employees, the "vitally affects" test is not applicable. *Chemical Workers v. Pittsburgh Plate Glass Co.,* supra.

Ben K. Glenn, Respondent's senior employee relations administrator admitted that the OPRB changes would affect his decision-making about retirement and that he would not work for an employer without anticipating that he would have health and life benefits in retirement. That testimony highlights the importance to active employees of negotiations over OPRB changes.

Moreover, even though the OPRBs are not included in the parties contract, i.e., the memorandum of agreement, Respondent has an obligation to bargain in good faith before instituting the changes. *St. Vincent Hospital*, supra.

By announcing its planned OPRB changes, announcing that the changes would be implemented and refusing to bargain after the Union's request, Respondent failed to fulfill its bargaining obligation and thus violated Section 8(a)(5) and (1) of the Act.

The Company has unilaterally implemented and modified OPRB's for many years and the IBEW has never challenged those actions or asked to negotiate OPRB's: therefore, the IBEW has accepted the Company's actions on OPRB's and has waived any claim to a right to negotiate over the current changes through inaction and past practice.

The postretirement medical coverage plan document provides the Company has the right and discretion to unilaterally modify the plan. Such language constitutes an explicit waiver by the IBEW of any right to bargain.

As shown above, I find that the record shows that Respondent and the Union did engage in discussions over the years regarding future retirement benefits. On a few occasions the Union successfully negotiated changes in Respondent proposals. For example, as shown above, in 1987 or 1988 the Union successfully negotiated a reduction in proposed percentage of insurance premiums from 38 percent. Also around that same time the Unions successfully proposed changes in the number of visits to chiropractors.

The record also shows that the Union regularly proposed changes in medical benefits as part of their "askings" during contract negotiations.

The practice routinely included Respondent notifying the Union of proposed changes. The record shows without serious dispute that before 1995 there was never an instance where Respondent and the Union did not successfully agree to proposed changes. Frequently the Union simply did not object to the proposed changes. A "union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time." *Owens Corning*, 282 NLRB 609 (1987). See *United Hospital Medical Center*, 317 NLRB 1279, 1282–1283 (1995).

However, there was no evidence that the Union ever specifically waived its right to bargain over future retirement benefits.

Moreover, the fact that the current collective-bargaining agreement does not include the OPRB benefits and Respondent's unilaterally inclusion of a reservation of rights clause in its April 21, 1995 proposal, does not constitute waiver of the Union's right to bargain. The evidence failed to show that the Union ever "consciously yielded" or "clearly and unmistakable waived" its interest in future retirement benefits. *T.T.P. Corp.,* 190 NLRB 240 (1971).

The zipper clause contained in the contract does not excuse the Respondent's conduct. That clause provides that insurance coverage changes are not subject to negotiations until the expiration of the collective-bargaining agreement absent mutual consent. Obviously, that provision does not provide for unilateral changes without bargaining absent agreement of the parties. As shown above I have not credited the testimony of Charles Davis. I specifically reject his testimony that the "zipper clause" was meant to enable Respondent to change medical insurance coverage during the life of the collective-bargaining agreement.

Respondent pointed out that its representatives frequently told the Union that it did not negotiate over health and life insurance benefits. However, as show above, the record shows that Respondent and the Union did negotiate over health and life benefits. Moreover, Respondent, by making that statement, may not impose on the Union a waiver of the Union's right to bargain.

The parties' memorandum of agreement included no terms which are "incisive, direct, and specific in their assault on the existence of any negotiating responsibility during the term of the contract, and in their desire to commit unresolved issues to management prerogatives as they existed on entry of the agreement." *Rockford Manor Care Facility*, 279 NLRB 1170, 1174 (1986).

The record failed to establish there was a clear and unmistakable relinquishment of the right to bargain over OPRB changes. *Trojan Yacht*, 319 NLRB 741 (1995). The record proved that the Union did not waive its right to bargain over OPRB changes. *Keystone Consolidated Industries,* 309 NLRB 294 (1992).

CONCLUSIONS OF LAW

1. Mississippi Power Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Electrical Workers, Local Locals Nos. 1204, 1209, 1210, 1211, AFL–CIO are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent, by unilaterally changing its other postretirement benefits (OPRB) for unit employees without bargaining with the Locals as representative of the employees in the bargaining unit described at article I, section 1 of their collective-bargaining agreement, has engaged in conduct violative of Section 8(a)(1) and (5) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6), (7), and (8) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent has illegally changed other postretirement benefits (OPRB) for bargaining unit employees without bargaining with the Locals as representative Respondent is ordered to restore OPRB to pre-April 21, 1995 status and, upon request, bargain in good faith with the Union regarding OPRB.

[Recommended Order omitted from publication.]